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NO. 75-642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

CORNELIUS J. KEHOE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES J. HIPPARD, SR.
3701 Kirby Drive, Suite 1230
Houston, Texas 77006

CLAUDE T. ALLEN
7709 Long Point Building,
Suite 111
Houston, Texas 77055

Attorneys for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision, Statute, and Federal Rules of Criminal Procedure Involved	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	13
Certificate of Service	14
Appendix A—Opinion of the Court of Appeals	A1
Appendix B—Opinion of the District Court in Crim. No. 73-H-413	A21
Appendix C—Opinion of the District Court in Crim. No. 73-H-213	A27
Appendix D—Judgment of the Court of Appeals	A37
Appendix E—Denial of Petitions for Rehearing and Suggestion for Rehearing En Banc	A38

LIST OF AUTHORITIES

CASES	Page
Illinois v. Somerville, 410 U.S. 458 (1973)	7, 10
Johnson v. Zerbst, 304 U.S. 458 (1938)	12
Serfass v. United States, 420 U.S. 377 (1975)	6, 8, 9, 11, 12, 13
United States v. Jenkins, 420 U.S. 358 (1975)	6, 8, 9, 10
United States v. Means, 513 F.2d 1329 (8th Cir. 1975)	10
UNITED STATES CONSTITUTION	
Fifth Amendment	3
UNITED STATES STATUTES	
19 U.S.C. 3731, as amended by Title III of the Omnibus Crime Control Act of 1970, 84 Stat. 1890	3
FEDERAL RULES OF CRIMINAL PROCEDURE	
Rule 12(b)(2)	3, 5, 6, 7, 12
Rule 29(a)	3, 4, 5, 6

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Cornelius J. Kehoe, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A20) is reported at 516 F.2d 78. The opinion of the district court in Criminal Number 73-H-413 (App. B, *infra*, pp. A21-A26) was not reported. The opinion of the district court in Criminal Number 73-H-213 (App. C, *infra*, pp. A27-A36) is reported at 365 F. Supp. 920.

JURISDICTION

The judgment of the court of appeals was entered on 16 July 1975 (App. D, *infra*, p. A37). Timely petition for rehearing and suggestion for rehearing en banc were denied on 1 October 1975 (App. E, *infra*, p. A38). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Petitioner's first criminal jury trial ended in a judgment of acquittal by the court entered at the conclusion of the prosecution's case-in-chief for the reason that the indictment failed to state an offense against the laws of the United States of America. In reaching his decision, the district judge analyzed the evidence adduced at trial and made factual conclusions in Petitioner's favor based on said evidence. Under these circumstances does the Double Jeopardy Clause bar Petitioner's prosecution under a new indictment based on the identical criminal misconduct alleged in the first indictment and based on the same evidence introduced by the prosecution in the first trial?

2. Whether the Double Jeopardy Clause prohibits further prosecution or appeal when the district court terminated the first trial in Defendant's favor, after jeopardy had attached, for failure of the indictment to state an offense.

3. Pursuant to Fed. R. Crim. P. 12(b)(2), Petitioner's trial attorney waited until the prosecution had put on its case-in-chief before making an acquittal motion for failure of the indictment to state an offense. Can this procedure on the part of Petitioner's trial attorney, specifically permitted by Rule 12(b)(2), constitute the basis

for implying a waiver of Petitioner's constitutional right to double jeopardy protection?

CONSTITUTIONAL PROVISION, STATUTE, AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

19 U.S.C. 3731, as amended by Title III of the Omnibus Crime Control Act of 1970, 84 Stat. 1890, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

Federal Rule of Criminal Procedure 12(b)(2) provides in pertinent part:

> Defenses . . . based on defects in the . . . indictment . . . other than that it fails to . . . charge an offense may be raised only by motion before trial. . . . [F]ailure of the indictment . . . to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Federal Rule of Criminal Procedure 29(a) provides in pertinent part:

> The court on motion of a defendant . . . shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

STATEMENT

Petitioner Kehoe was indicted in May of 1973, under 18 U.S.C. 657 for the offense of embezzling real property. The case proceeded to jury trial and after four days of trial, during which there was testimony from many witnesses and there were many exhibits introduced, the Government rested its case-in-chief. Petitioner then moved for a judgment of acquittal under F.R.Crim.P. 29 on several grounds, one being that the indictment failed to charge an offense. Petitioner argued that real property could not be embezzled and that no case of embezzlement of any property had been established by the Government's evidence (C.A. App. pp. 244-255). In the process of deciding to grant Petitioner's motion for acquittal, the trial court considered all of the evidence which had been introduced by the government (C.A. App. 258-259), and made the following factual determination in reaching the decision to acquit Petitioner:

> This Court was aware of and concerned with the fine distinctions being made when the motion for judgment of acquittal was urged by defendants at the close of the Government's case. Had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendant's in their fiduciary capacities diverting the consideration of such sale for their own benefit, an indictment alleging embezzlement might have been proper. However, the circumstances of this case, accepted as true

> for purposes of this motion, showed that the alleged consideration never was intended to flow to Surety but only to the defendants. Although the defendants ostensibly deprived Surety Savings of real estate holdings, no funds, credits or securities belonging to Surety were taken. While this distinction is a fine one, it is one that is critical to the offense of "Embezzlement" (C. A. App. 265).

In deciding to grant judgment of acquittal to Petitioner, the trial court first scrutinized with great care the thrust of Rule 29(a) as well as the significance of Rule 12(b)(2) (C.A. App. 257). The government did not attempt an appeal of the acquittal.

Thereafter, in November of 1973 the government obtained a second indictment charging petitioner with fraudulently receiving the benefits of a federally insured savings association transaction in violation of 18 U.S.C. 1006. The government concedes that this second indictment relates to the identical criminal misconduct alleged in the first indictment and that, if permitted to go forward with a second trial, the evidence the government will offer to prove the allegations of the second indictment is the same as that offered by the government in the trial on the first indictment (C.A. App. 58). For purposes of the double jeopardy clause it is of no significance that petitioner was originally indicted under 18 U.S.C. 657 and is now under indictment for violation of 18 U.S.C. 1006. Both indictments arise out of the same factual setting; all that has been changed is the prosecution's legal theory (App. A, *infra,* A10).

Petitioner moved to dismiss the second indictment, arguing that he had been acquitted in the earlier trial and that a second trial arising out of the same transaction

would put him twice in jeopardy. After a hearing, the district court (with a different judge presiding) sustained the double jeopardy contention and dismissed the second indictment (C.A. App. 108). In granting the motion to dismiss, the district court made the fact finding that the first trial ended in a judgment of acquittal under Rule 29 (a) rather than a dismissal of the indictment under Rule 12 (b) (2) (C.A. App. 183). The government appealed the dismissal of this second indictment pursuant to the provisions of 18 U.S.C. 3731.

The Court of appeals, in a split decision, reversed the dismissal judgment of the district court and remanded the case for trial. The majority acknowledges that, under the teachings of *United States v. Jenkins,* 420 U.S. 358 (1975), once jeopardy has attached, a judgment that either is, or may have been, an acquittal on the merits bars further proceedings by reason of the constitutional prohibition of double jeopardy. The majority acknowledged the "ambiguous" fact findings of the judge in the first trial (App. A, *infra,* A6), but none-the-less concluded that the Rule 29 (a) judgment of acquittal in the first trial was in fact a dismissal of the indictment under Rule 12 (b) (2) (App. A, *infra,* A7). The dissent concluded that *Jenkins* is controlling because the district court in the first trial did consider the evidence presented and therefore went beyond the face of the indictment in its ruling (App. A, *infra,* A16).

Once having characterized the trial court's ruling in the first trial as purely legal and involving only a dismissal of the indictment, the majority then proceeded to the questions saved by this Court in *Serfass v. United States,* 420 U.S. 377 (1975), namely, (1) whether a trial court's dismissal of an indictment on purely legal grounds after

jeopardy had attached would be appealable, and (2) whether double jeopardy would bar an appeal from a mid-trial ruling discharging a defendant on a legal ground where said defendant was afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense. The majority concluded that the interest-balancing approach of the mistrial cases, particularly *Illinois v. Somerville,* 410 U.S. 458 (1973), is applicable and that the legitimate demand for public justice must be weighed against petitioner's interest in not being twice placed in jeopardy. The majority then conducted the weighing process and concluded that "a defendant who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained" (App. A, *infra,* A14). In this regard, the dissent concluded that utilization of a trial tactic expressly permitted by Rule 12 (b) (2) cannot be the basis for denying petitioner's right to double jeopardy protection (App. A, *infra,* A20).

REASONS FOR GRANTING THE WRIT

1. The majority decision below conflicts with this Court's decision in United States v. Jenkins, 420 U.S. 358 (1975), in that the Court of Appeals failed to grant petitioner the protection of the double jeopardy clause under the same fact situation as was presented in Jenkins.

Petitioner's first trial was before a jury and Petitioner's Motion for judgment of acquittal pursuant to Fed. R.

Crim. P. 29 (a) was not made until the close of the government's case-in-chief. Therefore, jeopardy had attached. *Serfass v. United States,* 420 U.S. 377 (1975). It is undisputed that the district court did consider all of the evidence in passing on Petitioner's motion for judgment of acquittal (C.A. App. pp. 258-259). It is also without dispute that, before granting Petitioner's motion for judgment of acquittal under Rule 29 (a), the district court carefully considered and rejected the Rule 12 (b) (2) alternative of dismissing the indictment for failure to charge an offense (C.A. App. 257).

This Court held in *Jenkins* that

> [I]t is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand . . . . The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause . . . . 420 U.S. at ____; 43 L.Ed.2d at 259.

Had the government elected to appeal the acquittal in the first trial it would have run head-on into *Jenkins* and must still do so when it reindicts Petitioner for the identical criminal misconduct and attempts to retry Petitioner utilizing the exact same evidence.

The majority below held that the judgment of acquittal in the first trial was in fact a dismissal of the indictment for failure to charge an offense to which the holding in *Jenkins* does not apply. This is a misconception of the

Jenkins rule since it is not a question of whether the district court's action be termed a dismissal or an acquittal, rather the question is whether the district court did consider the evidence presented and therefore went beyond the face of the indictment in determining to terminate the trial in Petitioner's favor.

The dissent below points out that:

> In both *Jenkins* and the present appeal, it is unclear whether the district judge terminated the trial based upon factual or legal conclusions. In both cases, however, the judge apparently relied at least in part upon the facts as developed, and thereupon concluded the trial. The court in *Jenkins* held that retrial of the defendant in such a posture would place him twice in jeopardy. I see the posture of the present case as requiring an identical result. (App. A, *infra,* A17).

This conflict justifies the grant of certiorari to review the judgment below so that the bar and the judiciary may be properly advised as to the meaning of *Jenkins.*

2. The decision below conflicts with the decision of another Court of Appeals on a question reserved by this Court in Serfass v. United States, 420 U.S. 377 (1975): whether a district court's dismissal of an indictment on purely legal grounds, after jeopardy has attached, is appealable.

In *Serfass v. United States, supra,* this Court said "we of course express no opinion on the question whether a similar ruling [dismissing an indictment on purely legal grounds] by the District Court after jeopardy had attached would have been appealable". 420 U.S. at____; 43 L.Ed.

2d at 277. The majority in the decision below answered this question in the affirmative. They cited the mistrial case of *Illinois v. Somerville,* 410 U.S. 458 (1973) (in which a mistrial was granted due to an incurably defective indictment) for the proposition that the Double Jeopardy Clause does not stand as an absolute barrier against appeals by the Government; that there is a societal interest to be weighed. The majority acknowledged that the *Somerville* - interest balancing approach had been rejected by *United States v. Jenkins, supra,* as not applicable to proceedings in the trial court which terminate in the defendant's favor. But the majority reasoned that this rejection was only intended in cases ending in an acquittal on the merits, and that *Jenkins,* did not reject the *Somerville* approach for cases ending in dismissals based on purely legal grounds (App. A, *infra,* A. 13).

The majority below then determined that on balance the Double Jeopardy Clause did not prevent an appeal by the Government because Petitioner's trial attorney had pursuant to Fed. R. Crim. P. 12 (b) (2) elected to wait until the Government had put on its case-in-chief before making an acquittal motion for failure of the indictment to state an offense (see reason 3 for granting the writ, *infra*). Further, they held that since the Double Jeopardy Clause was not applicable in this case, the Government was free to retry Petitioner.

United States v. Means, 513 F.2d 1329 (8th Cir. 1975) is in direct conflict with the majority decision below. In *Means* the case was terminated in the middle of trial by a dismissal based on alleged prosecutorial misconduct. The Government attempted to appeal and argued the applicability of the *Somervilie* line of mistrial cases and thus the inapplicability of the Double Jeopardy Clause.

The Court of Appeals rejected the Government's position saying:

> Neither the facts nor the policies expressed in [the *Somerville* line of mistrial cases] apply to the present case. Defendants were not convicted at trial, nor was a mistrial declared. The situation presented herein is a trial which terminated in defendant's favor after jeopardy had attached, before a finding of guilt by the trier of fact . . . . Further, the court specifically rejected the mistrial alternative. Although our precise question was not answered by the Supreme Court in its recent trilogy, the policies expressed in those opinions require our conclusion that a government appeal in this case would violate the Double Jeopardy Clause of the Constitution. 513 F.2d at 1333.

This is, of course, the position of Petitioner and it was the position of the dissenting member of the court below. The conflict regarding this far reaching constitutional question justifies the grant of certiorari to review the judgment below.

3. The decision below is based in part upon a point expressly reserved by this Court in Serfass v. United States, 420 U.S. 377 (1975): the case of a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to the trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.

The majority in the opinion below held that:

> . . . a defendant who for reasons of trial tactics delays until mid-trial a challenge to the indictment that

> could have been made before trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained (App. A, *infra,* A14).

But, as was pointed out by the dissent below:

> It is true that the delay was an admitted trial tactic, but experienced counsel were taking advantage of what is expressly permitted by Rule 12(b)(2). They wished to see the government's case before they move to strike the indictment (App. A, *infra,* A20).

In effect the majority below has ruled that by reason of Petitioner's trial attorney having followed a procedure expressly permitted by the Federal Rules of Criminal Procedure, Petitioner has been deemed to have waived one of his fundamental constitutional rights. This is contrary to the teachings of *Johnson v. Zerbst,* 304 U.S. 458 (1938) that the courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights.

The Solicitor General raised this point in *Serfass* and his brief in that case contains the appropriate answer to the problem posed:

> . . . Congress, or this Court through its rulemaking power (18 U.S.C. 3771), could eliminate the problem . . . by providing that all legal claims and defenses that are known to the defendant prior to trial and are based upon undisputed facts *must* be raised prior to trial. A delay in asserting such a claim could either result in a waiver of the claim . . . or a termination of the trial to permit an appeal by the

> United States if the trial judge rules in favor of the defendant. (See Brief for Respondent in *Serfass v. United States,* No. 73-1424, at 50).

The solution utilized by the majority below denies Petitioner's constitutional right to protection against double jeopardy because his trial attorney exercised a procedural right. This solution poses a serious constitutional question and justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

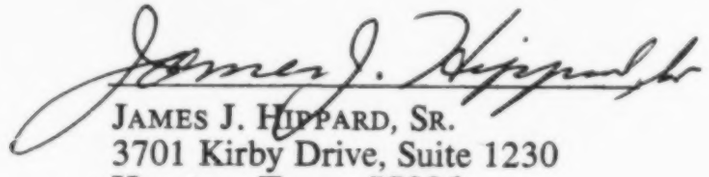
JAMES J. HIPPARD, SR.
3701 Kirby Drive, Suite 1230
Houston, Texas 77006

CLAUDE T. ALLEN
7709 Long Point Building,
Suite 111
Houston, Texas 77055

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 1975, three copies of the Petition for Writ of Certiorari were air mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.



JAMES J. HIPPARD, SR.
3701 Kirby Drive, Suite 1230
Houston, Texas 77006

APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

Cornelius J. KEHOE and Ray K. Bullock,

Defendants-Appellees.

NO. 74-2353.

UNITED STATES COURT OF APPEALS,

Fifth Circuit

July 16, 1975

Appeal from the United States District Court for the Southern District of Texas.

Before BELL, THORNBERRY and GEE, Circuit Judges.

THORNBERRY, Circuit Judge:

Presented for decision in this § 3731 appeal is a question expressly left open by the Supreme Court in its recent double jeopardy trilogy. In Serfass v. United States, 1975, ____ U.S. ____, 95 S.Ct. 1055, 43 L.Ed.2d 265, the Court declined to "intimate any view concerning the case put by the Solicitor General, of 'a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to the trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.' " ____ U.S. at ____, 95 S.Ct. at 1065, 43 L.Ed.

2d at 277. In this case we conclude, first, that Kehoe and Bullock allowed themselves to be placed in jeopardy for tactical reasons, and second, that because of their decision they are not entitled to claim the protection of the double jeopardy clause. Accordingly, we assume jurisdiction of the appeal and reverse the judgment of the district court.

I.

On January 18, 1973 the grand jury named appellees in an eleven-count indictment charging a number of persons with participation in an alleged loan kickback scheme. On May 14, 1973 a superseding eleven-count indictment was handed down by the grand jury. This indictment, as well as the one that it superseded, alleged violations of 18 U.S.C. § 1006.[1] Also on May 14, however, Kehoe and Bullock alone were charged in a single count indictment with embezzling certain land from a savings association in violation of 18 U.S.C. § 657.[2] Ap-

1. Section 1006 renders illegal the making of false entries in the records of, or the mishandling of the property of, certain enumerated federal credit institutions, with the intent to defraud the United States.

2. Section 657 provides:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

pellees pleaded not guilty to the embezzlement charge, and on October 29, 1973 a jury was empanelled and trial began. After the government had presented its case-in-chief, appellees moved for a "judgment of acquittal" on the ground, inter alia, that the indictment failed "to charge an offense against the laws of the United States of America since real property cannot be the subject of an embezzlement under the provisions of Title 18, United States Code, Section 657." In a memorandum opinion reviewing the permissible reach of § 657, Judge Bue announced his decision to grant appellees' motion "on the grounds that the indictment failed to state an offense against the United States of America."[3] Shortly thereafter the government procured a new indictment against appellees for the same transaction made the subject of the previous indictment; this time, however, the grand jury charged Kehoe and Bullock with a violation of 18 U.S.C. § 1006. Appellees promptly moved to dismiss this indictment, arguing, inter alia, that Judge Bue had acquitted them in the earlier trial and that a second trial arising out of the same transaction would put them twice in jeopardy. After a hearing, Judge Seals sustained the double jeopardy contention and dismissed the second indictment. The United States now seeks to appeal that ruling.

3. The correctness of this ruling is not before us.

[1] The government may appeal an adverse judgment in a criminal case only when authorized by statute. United States v. Sanges, 1892, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445. 18 U.S.C. § 3731 provides that:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Here Judge Seals dismissed the second indictment because he felt that after Judge Bue's ruling on the first indictment, the double jeopardy clause barred further prosecution. Hence, our resolution of the double jeopardy issue will control not only the jurisdictional question but the merits as well.[4] With that in mind, we proceed to the main issue on appeal: Does the double jeopardy clause bar the government from further prosecuting Kehoe and Bullock?

II.

[2] Judge Bue expressly denominated his judgment an acquittal, rather than a dismissal of the indictment. Nevertheless, although "[i]t is, of course, settled that 'a

4. The case is in its present posture because the government, rather than appealing Judge Bue's ruling, chose to reindict appellees under a different statute. Hence, the constitutional double jeopardy question that we would have addressed as a jurisdictional matter had Judge Bue's order been appealed was instead presented to Judge Seals as an argument on the merits for dismissing the second indictment. Nevertheless, even Judge Seals' judgment would not be appealable if "the double jeopardy clause of the United States Constitution prohibits further prosecution" of Kehoe and Bullock. Hence, in this situation the merits and the jurisdictional question merge.

verdict of acquittal . . . is a bar to a subsequent prosecution for the same offense.' . . . [t]he word [acquittal] . . . has no talismanic qualities for purposes of the Double Jeopardy Clause." Serfass v. United States, *supra*, ____ U.S. ____, 95 S.Ct. at 1064, 43 L.Ed.2d at 276. In short, as the Supreme Court noted in a related context, "the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction." United States v. John, 1971, 400 U.S. 470, 478 n.7, 91 S.Ct. 547, 553 n.7, 27 L.Ed. 2d 543, 552 n.7. It follows that we must examine Judge Bue's ruling and properly characterize it for purposes of the double jeopardy clause.

[3] Kehoe and Bullock were of course not acquitted on the general issue by the jury. The primary factfinder made no determination of their guilt or innocence. In certain circumstances, however, the trial judge even in a jury trial may find facts in a manner that will, by a doctrine similar to collateral estoppel, act as an acquittal.[5] Thus, if Judge Bue based his ruling upon facts that went to the general issue of the case, Kehoe and Bullock were in substance, as well as in name, acquitted. The constitutional rule against further prosecution after an acquittal would

5. United States v. Sisson, 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed. 2d 608; United States v. Jorn, *supra*, 400 U.S. at 478 n.7, 91 S.Ct. at 553 n.7, 27 L.Ed.2d at 552 n.7. *See also* Note, Government Appeals of "Dismissals" in Criminal Cases, 87 Harv. L. Rev. 1822 (1974).

Although the Supreme Court in United States v. Wilson, ____U.S. ____, 95 S.Ct. 1013, 43 L.Ed.2d 232 read *Sisson* as a statutory rather than a constitutional decision for purposes of reviewability on appeal, *Wilson* noted and apparently approved *Sisson's* suggestion (399 U.S. at 290 & n.18, 90 S.Ct. at 2129 & n.18, 26 L.Ed.2d at 624 & n.18) that the trial judge's ruling in that case posed a constitutional bar to further *trial* proceedings against Sisson. ____U.S. at____, 95 S.Ct. at 1025-26, 43 L.Ed.2d at 246.

then come into play to prevent us from assuming jurisdiction.[6]

A reading of Judge Bue's opinion reveals that except perhaps for one brief passage he was clearly discussing only the legal sufficiency of the indictment and not the facts of the case before him. Hence, appellees' argument on this point turns entirely on one ambiguous statement, quoted below:

> This Court was aware of and concerned with the fine distinctions being made when the motion for judgment of acquittal was urged by defendants at the close of the Government's case. Had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendants in their fiduciary capacities diverting the consideration of such sale for their own benefit, an indictment alleging embezzlement might have been proper. However, the circumstances of this case, accepted as true for purposes of this motion, showed that the alleged consideration never was intended to flow to Surety but only to the defendants. Although the defendants ostensibly deprived Surety Savings of real estate holdings, no funds, credits or securities belonging to Surety were taken. While this distinction is a fine one, it is one that is critical to the offense of embezzlement.

App. at 265. Appellees apparently contend that Judge Bue found that, if other evidence had been introduced, the prosecution could have obtained a conviction under the indictment as it then stood, despite the fact that it al-

6. This case is not like *Sisson* or *Wilson;* reversal on appeal would mean that appellees' second trial could go forward. Thus, if Judge Bue's judgment was an acquittal, the double jeopardy clause would prohibit further proceedings against Kehoe and Bullock, *see* note 5 *supra,* and we would be required to dismiss the appeal.

ledged embezzlement of real property. The government argues, on the other hand, that this passage was simply a hypothetical situation posited by the trial judge in which the defendants could properly have been indicted under 18 U.S.C. § 657. We think that the government is essentially correct.

[4] First, it is doubtful whether the judge intended to make findings of fact; he clearly states that certain facts will simply be "accepted as true for purposes of this motion." Second, Judge Bue concluded only that "an indictment alleging embezzlement might have been proper," and not that an indictment alleging embezzlement *of land* might be permissible. Therefore, even if he did intend in this passage to make formal findings, the resulting comments were not necessary to the stated ground for granting appellees' motion—i. e., that the indictment in question failed to state an offense—and thus do not constitute findings of fact binding on this court. *Compare* United States v. Esposito, 7 Cir. 1974, 492 F.2d 6, 9, cert. denied 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 760 (1974),[7] *with* United States v. Sorenson, 7 Cir. 1974, 504 F.2d 406; United States v. Jaramillo, 8 Cir. 1975, 510 F.2d 808. In these circumstances Judge Bue's ruling can only be characterized as purely legal—and hence not an acquittal. There was no conclusion on innocence or guilt.

7. "[I]t is clear from the order that the court concluded that the fatal defect in the prosecution lay in the indictment's failure to state and the statute's failure to require a nexus with interstate commerce which would justify federal regulation. *The fact that the prosecution failed to prove such a connection, though alluded to in the order, was of no significance to the actual basis for the decision. The order was neither based upon nor limited in application to the facts of the case. Appeal, therefore, is not barred by the double jeopardy clause of the fifth amendment*" (emphasis added).

Consequently, since the rule forbidding further proceedings after an acquittal is inapplicable here, we must now consider whether the double jeopardy clause prohibits further prosecution of defendants who procure the mid-trial dismissal of the indictment on the ground that it fails to state an offense.

III.

The recent Supreme Court double jeopardy trilogy does not supply a direct answer. In United States v. Wilson, 1975, ____U.S.____, 95 S.Ct. 1013, 43 L.Ed.2d 232, the trial judge dismissed the indictment on speedy trial grounds after a jury had found Wilson guilty of converting union funds to his own use. Relying on United States v. Sisson, *supra,* the Court of Appeals rebuffed the government's attempt to appeal that ruling. The Supreme Court reversed. Justice Marshall carefully reviewed the legislative history of the new § 3731 and concluded that "Congress was determined to avoid creating nonconstitutional bars to the Government's right to appeal." ____U.S. at ____, 95 S.Ct. at 1019, 43 L.Ed.2d at 239. Proceeding then to an examination of the scope of the double jeopardy clause, the Court isolated "the prohibition against multiple trials as the controlling constitutional principle." ____U.S. at____, 95 S.Ct. at 1023, 43 L.Ed.2d at 243. Since in the case before it reversal on appeal would result only in reinstatement of the jury verdict and not in a new trial, the court concluded that the double jeopardy clause would not be offended by permitting the appeal.

[5] In United States v. Jenkins, 1975, ____U.S.____, 95 S.Ct. 1006, 43 L.Ed.2d 250, the defendant was indicted for knowingly refusing to submit to induction into the armed forces. After a bench trial the court "dismissed

the indictment" because the Board had—erroneously under then-existing law—refused to entertain Jenkins' "late-ripening" claim to conscientious objector status. The government sought to appeal this ruling, claiming that the district judge erred in refusing to give retroactive effect to a Supreme Court decision that legitimated the Board's refusal but which was handed down after Jenkins declined induction. The Court of Appeals dismissed for lack of jurisdiction, and the Supreme Court affirmed. The Second Circuit had characterized the district court's judgment as an acquittal. The Supreme Court was less sure, and noted the difficulty in bench trials of determining whether a judgment discharging the defendant rested upon factual or legal grounds. Nevertheless, the Court was reasonably certain that the trial judge had not found all factual issues *against* the defendant. Thus, the case before them was not like *Wilson,* where reversal and remand would lead only to reinstatement of a guilty verdict. In deciding that the double jeopardy clause would forbid further proceedings against Jenkins the Court articulated this standard:

> Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.

____U.S. at____, 95 S.Ct. at 1013, 43 L.Ed.2d at 259. At first glance the broad rule stated here would appear to require dismissal of the present appeal. We have before us a judgment discharging the defendants, and if it is

reversed, further proceedings devoted to resolution of factual issues going to the elements of the offense charged will be necessary.[8] Nonetheless, the final case of the double jeopardy trilogy strongly implies that the *Jenkins* standard is not as sweeping as it first appears.

In Serfass v. United States, *supra,* the district court granted the defendant's pre-trial motion to dismiss the indictment on the legal ground that the Selective Service Board had erred in its handling of Serfass's claim to conscientious objector status. The Court of Appeals decided that the government could appeal this order and reversed on the merits. The Supreme Court affirmed, holding that since Serfass had never waived his right to a jury trial, the district judge had made his ruling before Serfass had been placed in jeopardy and hence the double jeopardy clause had no application. Most significant for present purposes, however, the Court reserved two questions not necessary to decision of the case before it: (1) "whether a similar ruling [to the one actually made in *Serfass*] by the district court *after jeopardy had attached* would have been appealable," (emphasis added), and (2) whether appeal would be barred from a mid-trial ruling discharging the defendant on a legal ground that could have been raised by the defendant before trial. ___U.S. at___, 95 S.Ct. at 1065, 43 L.Ed.2d at 277-78. The implication that these might be open issues is important, because both hypothetical cases seem to fall directly within the *Jenkins* rule. If a legal bar to further proceedings is raised by the defendant after jeopardy has

8. For purposes of the double jeopardy clause it is of no significance that appellees were originally indicted under 18 U.S.C. § 657 and are now under indictment for violation of 18 U.S.C. § 1006. Both indictments arise out of the same factual setting; all that has changed is the prosecution's legal theory.

attached, a judgment sustaining the objection would result in the defendant's discharge, and upon reversal and remand new factual inquiries would perforce be made. Yet the Supreme Court treated the *Serfass* hypotheticals as controversies for another day and not as cases clearly controlled by *Jenkins.* Consequently, it seems likely that the Court intended *Jenkins* to be limited to its facts: a bench trial terminated by a ruling that—since it may have been one in fact—must be treated as an acquittal for purposes of the double jeopardy clause.[9] Thus, none of the recent Supreme Court cases controls here.

[6-8] Accordingly, we must make an independent analysis of whether the double jeopardy clause prohibits further proceedings against appellees. Double jeopardy considerations first come into play when jeopardy attaches; in a jury trial attachment occurs when the jury is empanelled and sworn. Serfass v. United States, *supra,* ___ U.S. at___, 95 S.Ct. at 1062, 43 L.Ed.2d at 274. In this jury case jeopardy had clearly attached: the trial judge ruled on the indictment at the close of the government's case-in-chief. Nevertheless, "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." Illinois v. Somerville, 1973, 410 U.S. 458, 467, 93 S.Ct. 1066, 1072, 35 L.Ed.2d 425, 433, quoted in Serfass v. United States, *supra. See also* United States v. Sisson, *supra,* 399 U.S. at 303, 90 S.Ct. at 2137, 26 L.Ed.2d at 631; United States v. Pecora, 3 Cir. 1973, 484 F.2d 1289, 1294 n.7; Note, *supra* note 5 at 1836. Of course, once jeopardy has attached, a judgment that either is, or may be, an "acquittal on the merits" bars further proceedings. The Supreme Court has already

9. *But see* United States v. Means, 8 Cir. 1975, 513 F.2d 1329.

weighed the various considerations raised in this context and come down on the side of the defendant. United States v. Wilson, *supra*, ____U.S. at____, 95 S.Ct. at 1026, 43 L.Ed.2d at 246. We have determined, however, that Judge Bue's ruling in this case was not an acquittal. What we must decide, then, is whether a judgment discharging the defendant after jeopardy has attached on the ground that the indictment is incurably defective poses the same constitutional obstacle to a second trial that is supplied by an actual or an apparent acquittal.

[9] The Supreme Court case most nearly resembling this one is Illinois v. Somerville, *supra*. In *Somerville* the trial judge had declared a mistrial when the prosecution discovered, after the jury had been empanelled and sworn but before any testimony had been taken, that the indictment contained an incurable, jurisdictional defect. Distinguishing, inter alia, an earlier defective indictment case[10] on the basis that there the first trial had resulted in a verdict of acquittal by the jury, the Court held that "where the declaration of a mistrial implements a reasonable state policy and aborts a proceeding that at best would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice." 410 U.S. at 471, 93 S.Ct. at 1074, 35 L.Ed.2d at 435. Despite the different terminology used to abort the first trial in *Somerville* and the first trial here, the effect was the same—the dismissal of the indictment and the bringing of a new prosecution—and we believe that the interest-balancing approach employed in that case is also ap-

10. United States v. Ball, 1896, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300.

propriate in this one.[11] *See* United States v. Mayes, 6 Cir. 1975, 512 F.2d 637, 651-52; Comment, Double Jeopardy and Government Appeals of Criminal Dismissals, 52 Texas L. Rev. 303, 342 & n. 180; *cf.* Note, *supra* note 5, at 1838-40.

[10-13] Two factors make this case stronger for the defendants than *Somerville*. First, Kehoe and Bullock sat through a full day of trial, at which the prosecution presented its evidence against them. Second, the trial judge termed his decision an acquittal, rather than a mistrial or a dismissal, and the defendants could reasonably have believed that the government was barred from proceeding further against them; the possible psychological shock of being reindicted is not immaterial to traditional double jeopardy considerations. What we think controlling for double jeopardy purposes, however, is the manner in which this case is *less* strong for the defendants than *Somerville*. In the latter case the defendant objected strenuously to the termination of the first trial. Here, on the other hand, the defendants themselves challenged the indictment, but only after the jury had been sworn and the government had presented its case-in-chief. At oral argument counsel for appellees stated that he waited to make his "motion for acquittal" because he wanted an

11. In United States v. Jenkins, *supra*, the Supreme Court expressly disapproved the reasoning of the dissenting judge in the Court of Appeals, who argued that *Somerville*-type balancing is appropriate even in cases where the defendant has been acquitted: "We disagree with this analysis because we think it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here." ____U.S. at____ n.7, 95 S.Ct. at 1010 n.7, 43 L.Ed.2d at 256 n.7. Read in context, it seems plain that this language refers only to cases where the defendant was, or may have been, acquitted on the merits. We have already decided that ours is not such a case.

opportunity to view the government's evidence. We believe that a defendant who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before the trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained.[12] *Cf.* United States v. Serfass, *supra*, ____U.S. at____, 95 S.Ct. at 1065, 43 L.Ed.2d at 277-78; United States v. Jenkins, 2 Cir. 1973, 490 F.2d 868, 880. The Senate Report on the bill to amend old § 3731 reveals that Congress believed that the double jeopardy clause would not bar further proceedings in this type of case. S. Rep. No. 91-1296, 91st Cong., 2d Sess., 7, 8-12 (1970). *See also* United States v. Wilson, *supra*. In fact, the old statute's failure to permit a government appeal in cases like this one appears prominently in the Report as a reason for amendment. Under the flexible, interest-balancing approach of Illinois v. Somerville we think that the double jeopardy clause does not forbid further proceedings against appellees; the new § 3731 thus achieves one of its intended purposes. Accordingly, the judgment of the district court is reversed and the case is remanded for proceedings consistent with this opinion.[13]

Reversed and remanded.

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12. Fed. R. Crim. P. 12(b)(2) is not violated by this holding. That rule states, in pertinent part: "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." Although the rule removes the threat of procedural waiver with regard to jurisdictional defenses, it does not purport to prohibit courts from attaching other unfavorable consequences to the decision to withhold a motion until the middle of the trial.

13. There is no merit in appellees' additional contention that the pattern of government behavior toward them constitutes bad faith harassment in violation of the due process clause. *See* United States v. McGough, 5 Cir. 1975, 510 F.2d 598, 603-05.

BELL, Circuit Judge (dissenting):

Being of the view that jeopardy attached by virtue of the judgment of acquittal entered in the prior trial of defendants, and that Rule 12(b)(2), F. R. Crim. P., prevents defendants from being barred from claiming double jeopardy because of their delay in challenging the indictment, I would dismiss the government's appeal. I therefore respectfully dissent.

Defendants-appellees Kehoe and Bullock were indicted in 1973 under 18 U.S.C.A. § 657 for the offense of embezzling real property. The case proceeded to trial and at the close of the government's case-in-chief both defendants moved for a judgment of acquittal under Rule 29 F. R. Crim. P. on several grounds, one being that the indictment failed to charge an offense. They argued that real property could not be embezzled and that no case of embezzlement of any property had been established by the government's evidence. The district court granted this motion, agreeing with defendants on both points.

A second indictment was then obtained charging these same defendants with fraudulently receiving the benefits of a federally insured savings association transaction in violation of 18 U.S.C.A. § 1006. This indictment related to the same criminal misconduct alleged in the indictment previously dismissed, and the evidence to have been offered was also the same. Defendants moved to dismiss this second indictment on the grounds that jeopardy had attached in the prior proceeding. This motion was granted and the government now appeals.

The government contends that the judgment of acquittal in the first proceeding was in fact a dismissal of the indictment for failure to charge an offense. It is argued

that the district court did not reach the merits of the case, that there was no verdict in defendant's favor, and that therefore no jeopardy attached. I find no substance in these contentions. It appears that the district court did consider the evidence presented and therefore went beyond the face of the indictment in its ruling.

Recent United States Supreme Court decisions make it clear that principles of double jeopardy bar subsequent reprosecution once a case has terminated in defendant's favor based upon factual conclusions not found in the indictment but instead upon evidence adduced at trial. United States v. Jenkins, 1974, ____U.S.____, 95 S.Ct. 1006, 43 L.Ed.2d 250. *See also* Serfass v. United States, 1975, ____U.S.____, 95 S.Ct. 1055, 43 L.Ed.2d 265; United States v. Wilson, 1975, ____U.S.____, 95 S.Ct. 1013, 43 L.Ed.2d 232. The first question then is whether the trial court relied on such evidence in its determination. The district court in the second proceeding answered this question in the affirmative and I agree.

The critical language of the court in the first proceeding is as follows:

> This Court was aware of and concerned with the fine distinctions being made when the motion for judgment of acquittal was urged by defendants at the close of the Government's case. *Had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendants in their fiduciary capacities diverting the consideration of such sale for their own benefit, an indictment alleging embezzlement might have been proper.* However, the circumstances of this case, accepted as true for purposes of this motion, showed that the alleged consideration never was intended to flow to Surety but only to the defendants. Although the defendants ostensibly deprived Surety Savings of real estate holdings, no funds, credits or securities belonging to Surety were taken. While this distinction is a fine one, it is one that is critical to the offense of "embezzlement." (Emphasis added)

Thus it appears that the court found that the government had not put on sufficient evidence to sustain a conviction of embezzlement since embezzlement could not be of real property and the government failed to show that any personal property had been taken in the transaction.

Jenkins, supra, is controlling where, as here, facts adduced after defendants were put on trial before a trier of facts were considered in dismissing the indictment. ____ U.S. at ____, 95 S.Ct. 1006, 43 L.Ed.2d at 259. Jeopardy attaches, according to *Serfass,* when a defendant is put to trial before the trier of the facts. ____ U.S. at ____, 95 S.Ct. 1055, 43 L.Ed.2d at 274. This rule, according to *Jenkins,* includes a case where an indictment is dismissed by utilizing facts developed in that trial in connection with the dismissal although the trial did not reach the point of a verdict or judgment. ____ U.S. at ____, 95 S.Ct. 1006, 43 L.Ed.2d at 259. Such facts were utilized here.[1]

The opinion prepared by Judge Thornberry, as I perceive it, recognizes that *Jenkins,* without more, would control the disposition of this appeal and require affirmance. *Jenkins* is avoided, however, by deciding and

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1. In both *Jenkins* and the present appeal, it is unclear whether the district judge terminated the trial based upon factual or legal conclusions. In both cases, however, the judge apparently relied at least in part upon the facts as developed, and thereupon concluded the trial. The court in *Jenkins* held that retrial of the defendant in such a posture would place him twice in jeopardy. I see the posture of the present case as requiring an identical result.

applying the reserved hypothetical of Serfass, thus necessitating a balancing test with the result of estopping defendants from asserting a double jeopardy defense. This approach, in my judgment, misconstrues the reserved question in *Serfass,* decides it incorrectly as construed, and denies a constitutional right because of delay in the face of Rule12(b)(2).

The issue then is whether defendants are barred from claiming double jeopardy under the circumstances because they could have but did not challenge the indictment until the close of the government's case-in-chief. They could have questioned the indictment before trial by a motion to dismiss for failure to charge an offense under Rule 12(b)(2)[2] The same rule, however, provides that such a failure may be noticed by the court at any time. Defendants chose to wait until the close of the government's case-in-chief to make their motion and the court took notice of it. At that point, the sufficiency of the evidence was drawn into issue with respect to the validity of the indictment.

In *Serfass,* supra, the Supreme Court saved the question of the government being denied a right to appeal by the strategy of a defendant, although afforded an opportunity to do so prior to trial, knowingly allowing himself

2. Rule 12(b)(2)—Defenses and Objections Which Must Be Raised.

Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

to be placed in jeopardy before raising a legal defense. ____ U.S. at ____, 95 S.Ct. 1055, 43 L.Ed.2d at 277.[3] It must be remembered that the question being considered was only that of the right of the government to take an appeal under 18 U.S.C.A. § 3731. This statute permits an appeal by the government unless further prosecution is prohibited by the double jeopardy clause. The question saved went only to this and not, as the majority opinion does, to the delay being a bar of a jeopardy defense itself.

Whatever the Supreme Court meant by its reservation of the question, I do not understand it as creating a problem in this case. We have, in effect, entertained the appeal to determine whether we have jurisdiction under 18 U.S.C.A. § 3731. Section 3731 provides that no appeal shall lie where the double jeopardy clause of the Constitution prohibits further prosecution.[4] What the government has in fact appealed is the question whether jeopardy had attached. Thus we are in the position of having to take jurisdiction to determine if the appeal will lie. By way of analogy, cf. Bell v. Hood, 1946, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, which teaches that there are cases where jurisdiction must be exercised for the purpose of determining jurisdiction. This is such a case. If we found no error in the district court's conclusion that jeopardy had attached, it would follow that the appeal would be dismissed rather than affirmed.

3. 18 U.S.C.A. § 3731 provides:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

4. *Cf.* United States v. McGough, 5 Cir., 1975, 510 F.2d 598, 602 n.2.

This was the precise procedure followed in *Jenkins, supra,* in the Second Circuit. United States v. Jenkins, 2 Cir., 1973, 490 F.2d 868, 880..

It must be conceded that the reservation in *Serfass* of the deliberate delay question is perplexing. It purportly goes only to the right of appeal but, as expressed, it could relate also to barring double jeopardy as a defense. In any event, it is doubtful that the court would treat a constitutional right in such an off-hand fashion.

The Supreme Court has not considered the question whether the delay in attacking an indictment may bar a double jeopardy defense. The law of this circuit is that an indictment may be challenged for the first time on appeal, and after trial and conviction. Walker v. United States, 5 Cir., 1965, 342 F.2d 22, 26. It is also the law in other circuits. United States v. Beard, 3 Cir., 1969, 414 F.2d 1014, 1017; United States v. Bailey, 7 Cir., 1960, 277 F.2d 560, 562.

It is true that the delay was an admitted trial tactic but experienced counsel were taking advantage of what is expressly permitted by Rule 12(b)(2). They wished to see the government's case before they moved to strike the indictment. The trial court could have ruled, but did not, that the motion came too late. It happened that the court (the trier of the facts) considered the facts in its ruling and this gave rise to the double jeopardy claim.

The obtuse problem presented in this appeal is but another example of the labyrinthian state of criminal law, particularly in the trial stages. Although not without some apprehension, I believe that defendants have the better side of the case and I would, therefore, sustain the district court judgment and dismiss the appeal.

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. 73-H-413

UNITED STATES OF AMERICA

vs.

CORNELIUS J. KEHOE
AND RAY K. BULLOCK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court: United States of America vs. Cornelius J. Kehoe and Ray K. Bullock, criminal number 73-H-213, the following constitutes the findings of fact and conclusions of law, and may be amended or supplemented at a later time.

The court accepts as true the testimony of all the defendants' witnesses.

The court accepts their version of the facts of this case since they are not contested.

The court finds that in 73-H-213 jeopardy has attached.

Criminal number 73-H-413 is dismissed as to both defendants because jeopardy has attached.

The government is barred from trying them again.

The court finds that Judge Bue's opinion was not based on a motion to dismiss under Rule 12, but that the judgment of acquittal was granted under the federal rule of criminal procedure 29(A).

Rule 29(A) cites that judgment of acquittal shall be granted if the evidence is insufficient to sustain a conviction of such offense or offenses.

The motion which was filed at the conclusion of the evidence in chief of the government's case was a

[78]

motion and so called a motion for judgment of acquittal, which is the way to raise the question of sufficiency of the evidence.

I might point out in Judge Bue's opinion the last paragraph on page 6, and I will read it:

"This court was aware of and concerned with the fine distinctions being made when the motion for judgment of acquittal was urged by defendants at the close of the government's case. Had "—I emphasize had—"had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendants in their fiduciary capacities diverting the consideration of such sale for their own benefit, an indictment alleging embezzlement might have been proper. However, the circumstances of this case, accepted as true for purposes of this motion, showed that the alleged consideration never was intended to flow to Surety but only to the defendants."

That shows to me that Judge Bue not only was deciding this case on whether or not the indictment stated an offense which should have been raised by Rule 12 and, of course, Rule 12 motions can be raised at any time,

but that this opinion that he wrote and signed on the 8th day of November, 1973 did go to the sufficiency of the evidence because it was before him and it was before the jury and the judge had to dispose of it.

[79]

He could not dispose of part of it without disposing of all of it.

That the government did not appeal from that decision.

If the government now contends that that judgment of acquittal was really a motion to dismiss under Rule 12, the court ruled against the government and the government had a duty to appeal a motion to dismiss if they considered that now a motion to dismiss because the indictment does not state an offense.

The way you raise the question of whether or not an indictment states an offense is by Rule 12 and that gives the government the right to appeal if the judge rules against the government.

Because of the doctrine of collateral estoppel and the doctrine of due process of law, it would be unfair for the government now to come in and say that this was a motion to dismiss because the indictment did not state an offense.

The language at the bottom of page 6 and continued on page 7 I have read convinces me that since you had a jury, that one of the reasons Judge Bue granted the motion for judgment of acquittal, and I emphasize that that was before the court then, a motion for judgment of acquittal, which under Rule 29 can only be granted if the evidence is

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insufficient to sustain a conviction of such offense or offenses.

That double jeopardy does attach in this case, even if Judge Bue had made a mistake or if he himself was confused in his opinion because the fact of the matter is the defendants did plead not guilty and the government offered all the evidence that they could offer on the guilt of the defendants and they did have a trial and the judgment of acquittal under Rule 29 was granted.

That it would be manifestly unfair and unjust to subject these defendants to a trial on this case again in view of the other facts which I have heard from

the defendants in this hearing, which I accept to be true.

I might further state that you don't test the sufficiency of an indictment by the proof that's offered later on.

The sufficiency of the indictment is determined by the face of the indictment.

It seems to me that this indictment, from what he says at the bottom of page 6 and beginning of page 7, could have well stated an offense and the government has carved out of an offense and they have carved once and they can't carve it again.

Therefore, by the doctrine of carving as well as equitable collateral estoppel, they cannot try these

[81]

defendants on the same sets of facts again.

I am not passing on whether or not there was bad faith in the prosecution of this case because I have heard no evidence to the contrary, but am not passing on it.

I am not passing on whether or not there was a mistake or an accident in the government taking the position that you can embezzle land, but from the record, it shows the government pursued that theory that you can embezzle land from the beginning, either through mistake or not, and it was calculated to break or injure the defendants, not only in their mental condition and anxiety that they suffered, but also unnecessary expenses and also time of the court.
That meant that the government has taken up a long time in trying this case and now they want to take up some more time to try it again under what I would say is a mistake or accident.

The government did have the right to appeal this case. If they now take the position that what Judge Bue did was a granting of a motion to dismiss, when the court sustains a motion to dismiss and the government has a right to appeal that, which they didn't do, so they now, because of due process of law and collateral estoppel, they cannot now come into court and say that we think it was a motion to dismiss that was granted because it didn't state an offense, but we didn't appeal it, so we are going to put the

[82]

defendants to the expense of another trial.

The defendants were tried before a jury, a Rule 29 judgment of acquittal was entered, and, although Judge Bue must interpret his opinion differently from the way I do, I am convinced that jeopardy is attached

I finally would say that this does not extend to the other two cases pending in Judge Hannay's court.

This decision is not based on the fact that those cases have been pending a year, but I am persuaded somewhat by the facts that I have heard in this case and they reinforce the reason that equity and inherent fairness and due process of law compel this court to grant the defendants' motion to dismiss because of double jeopardy.

Now, that disposes of this case as far as this court is concerned. I am sure that Mr. Novak will appeal this decision, which he has a right to do, because it is a most unusual case, and it's a case that has caused this court a great deal of trouble because of the fact that I am passing somewhat on what another judge says, but, as I have told the lawyers and as Mr. Novak told the court, that when the reindictment came down in 413, that Judge Bue told Mr. Novak that he wanted the case not in his court and it wound up in my court and I didn't know that, of course, but I went to Judge Bue in our regular conference and brought it up to Judge Bue and the other judges.

[83]

Judge Bue asked me to keep the case.

Of course, I told Judge Bue that in effect I would be passing upon his opinion, and I don't mind doing that because we have to pass on opinions and facts all the time that are in dispute—some people can interpret it differently and, of course, Judge Bue knows that, and he knows that we all have to do our duty, as everyone has done in this case, as far as I can see, their duty.

We will leave it up to the court of appeals to decide if this court was right or not.

Thank you very much.

WOODROW SEALS

APPENDIX C

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. 73-H-213

UNITED STATES OF AMERICA

v.

CORNELIUS J. KEHOE and
and RAY K. BULLOCK

OPINION

(Informal written opinion of Judge Carl O. Bue, Jr.,
in chambers on November 1, 1973)

This Court has given close consideration to the Defendants' argument and authorities in support of their motion for judgment of acquittal as well as the Government's response, both as set forth in written legal memoranda as well as in conference in chambers yesterday. The legal area in question is not without considerable difficulty. In a relatively brief but intensive search of authorities which included a check of annotations, legislative history, and even a call to the Library of Congress, this Court has found no federal authority discussing whether or not embezzlement applies, or should apply, to real property as alleged in the indictment against these two defendants. This Court has located only a few

cases in state jurisdictions wherein the issue was considered. It is the opinion of this Court that historically the term embezzlement has been limited only to personal property. In the absence of specific legislation reflecting a clear intent to expand the term to cover real property, the more persuasive view of the existing jurisprudence is that embezzlement statutes were never intended by legislatures to cover offenses relating directly to real property such as is alleged in the indictment before this Court.

This is a criminal case in which the contents of an indictment must necessarily be scrutinized with great care. The Court is fully aware of the thrust of Rule 29 as well as the

[2]

significance of Rule 12(b)(2) of the Federal Rules of Criminal Procedure. These have been carefully considered. Because the Government has not met its burden of proof in demonstrating that the indictment recites an offense for which prosecution may be brought, a Judgment of Acquittal as to both defendants will be entered. This Court will issue a memorandum opinion within the next few days setting forth in greater detail the legal basis on which this conclusion was reached.

[1]

EXHIBIT B

MEMORANDUM AND ORDER
CRIMINAL NO. 73-H-213

(Caption Omitted)

(Filed November 8, 1973)

Following completion of the Government's case, the defendants moved for judgment of acquittal under Fed. R. Crim. P. 29(a) alleging several grounds in support thereof. Of central importance to this Court's decision was the claim that the indictment failed to charge an offense against the laws of the United States of America, this being a non-waivable defense under Fed. R. Crim. P. 12(b)(2). In what is apparently a case of first impression in the federal courts, this Court felt constrained to grant defendants' motion for the reasons set forth below.

The indictment charged that defendants Kehoe and Bullock, President and Advisory Director, respectively, of Surety Savings Association, an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, embezzled .3082 acres of land, valued at $35,000, belonging to said institution, in violation of Title 18, United States Code, Section 657. Construing the evidence most favorably to the

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Government, the defendants were essentially charged with having used their fiduciary positions of authority to convey title to the land from Surety Savings to a third party. The sole consideration was alleged to have been the assumption by that third party of a promissory note for

$35,000 on which the defendants were contingently liable. It was alleged that no consideration flowed to Surety Savings as a consequence of the conveyance of its property. The defendants strongly contest these assertions and contend that had they gone forward with the defense, they would have shown full consideration flowing to Surety Savings in an environment of bona fide, legal and legitimate business negotiations.

The critical issue before this Court was whether or not real property may be "embezzled" under this statute as alleged in the indictment.

Section 657, Title 18, United States Code provides, in pertinent part:

> Whoever, being an officer . . . of . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation . . . embezzles, abstracts, purloins or wilfully misapplies any monies, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise entrusted to its care, shall be fined . . . or imprisoned. . . .

Embezzlement has been defined for federal courts as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come". *Moore v. United States,* 160 U.S. 268, 269-70, 40 L.Ed. 422, 424, 16 S.Ct. 294, 295 (1895); *Woxberg v. United States,* 329 F.2d 284, 290 (9th Cir. 1964); 29A C.J.S. *Embezzlement* § 1 (1965); 26 Am. Jur. 2d *Embezzlement* § 1 (1966). It has

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been stated that embezzlement is a purely statutory offense, not having been a crime at common law. *Hughes v.*

United States, 4 F.2d 686, 687 (8th Cir. 1925); 29A C.J.S. *Embezzlement* § 2 at 4-5 (1965); 26 Am. Jur. 2d *Embezzlement* § 1 at 549-50 (1966). *Contra United States v. Davenport,* 266 Fed. 425, 431 (W.D. Tex. 1920), *aff'd,* 276 Fed. 803 (5th Cir. 1921); *United States v. Cadwallader,* 59 Fed. 677, 680 (W.D. Wis. 1893) [both district courts citing 4 Bl. Comm. 231, an authority not readily available to this court]. This Court's necessarily limited review of embezzlement and its history comports fully with the following summary:

> Embezzlement is purely statutory in its origin; it was unknown at common law, which, insofar as personal property was concerned, penalized only interferences with possession. Accordingly, at common law, if the possession of personal property was lawfully obtained in the first instance, its subsequent appropriation by the possessor constituted no offense. It was this failure of the common law to provide any criminal remedy for these breaches of trust, incident to the multiplying affairs of business on the part of servants, clerks, agents, bailees, trustees, and other persons occupying fiduciary positions that led to the enactment of the present Penal Code provision dealing with embezzlement. These provisions were not, however, intended to provide against every breach of duty or pecuniary obligation on the part of agents and employees toward principals and employers. Accordingly, in applying those articles of the Code to the various cases that may arise, careful discrimination is required, for it is sometimes difficult to draw with entire precision the line of demarcation between acts punishable as crimes under the code and those that are not within its purview, although presenting instances of breach of trust.

21 Tex. Jur. 2d *Embezzlement and Conversion* § 2 at 579-80 (1961).

The Government has contended that the statutory language "other things of value" was sufficiently broad to include real

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property. The defendants have contended that the Court should apply the statutory rule of construction denominated "ejusdem generis" wherein the phrase should be construed to include only those things of the same class or nature as those specifically enumerated in the statute, this class being limited to items of personal property.[1]

While there are critical distinctions between embezzlement and the other offenses included within this statute, all are basically similar in nature to larceny. *See Morissette v. United States,* 342 U.S. 246, 260-61, 96 L.Ed. 288, 299, 72 S.Ct. 240 (1951); *Moore v. United States,* 160 U.S. 268, 40 L.Ed. 422, 16 S.Ct. 294 (1895); *United States v. Northway,* 120 U.S. 327, 30 L.Ed. 664, 7 S.Ct. 580 (1887). Larceny is commonly defined as "the felonious taking and carrying away of the personal goods of another". *United States v. Turley,* 352 U.S. 407, 412, 1 L.Ed.2d 430, 434, 77 S.Ct. 397 (1957). The elements of embezzlement are admittedly somewhat different.

> [Embezzlement] differs from larceny in that the fact that the original taking of the property was lawful, or

1. The rule of *ejusdem generis,* closely related to that of *noscitur a sociis,* remains a valid rule of construction. *See United States v. Standard Oil Co.,* 384 U.S. 224, 228, 16 L.Ed.2d 492, 495, 86 S.Ct. 1427 (1966); *Haberman v. Equitable Life Assurance Society of United States,* 224 F.2d 401, 405 (5th Cir. 1955), *reh. den.,* 225 F.2d 837, *cert. denied,* 350 U.S. 948 (1956). The proper application of these rules is thoroughly discussed elsewhere. *See* 50 Am. Jur. *Statutes* §§ 249, 250 (1944). Most of the United States Supreme Court cases discussing the application and limits of these rules have been annotated. *See Annot.,* 94 L.Ed. 464 (1949).

> with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Moore v. United States, 160 U.S. 268, 269, 40 L.Ed. 422, 424, 16 S.Ct. 294, 295 (1895). *See also United States v. Powell,* 294 F.Supp. 1353, 1355 (E.D. Va. 1968), *aff'd,* 413 F.2d 1037 (4th Cir. 1969); 29A C.J.S. *Embezzlement* § 5 (1965). Notwithstanding this fact, and notwithstanding the apparent majority view that "embezzlement" is a purely statutory rather than common law offense, the term, nevertheless, has acquired a well established connotation which approaches the sanctity of a common law meaning. *United States v. Northway, supra,* 120 U.S.

[5]

at 334, 30 L.Ed. at 666. It is limited to items of personal property, similar to the offense of larceny after which embezzlement was patterned. Where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the United States Supreme Court has held that the general practice is to give that term its common-law meaning. *United States v. Turley,* 352 U.S. 407, 411, 1 L.Ed.2d 430, 433, 77 S.Ct. 397 (1957). This same practice appears to be proper for established terms such as "embezzlement".

In 1896 the Supreme Court of California was confronted with virtually the identical issue now before this Court, the specific statute there under consideration being one pertaining to "false pretenses".

> And the offense of false pretenses, under the English statutes, has always been construed as largely analog-

ous to, and closely bordering upon, that of larceny, and as applying only to personal property, which was capable of manual delivery, and the subject of the latter offense, and has always been punishable in much the same manner as larceny. Real property under the English law was never the subject of the offense either of cheating or of false pretenses. Being incapable of larcenous asportation, it was not regarded as requiring at the hands of the criminal law the same protection as personalty. Since it could not be carried away and dissipated like chattels, although a man might be deprived of his landed estate by means of fraudulent practices and devices, yet the property was bound to remain stationary, and accessible to the reach of the law, and he was relegated to the civil courts for his redress of the wrong.

Our American statutes upon the subject have all followed more or less closely those of England. As indicated, there are slight differences in language, but in substantive purpose and effect they are the same.

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People v. Cummings, 114 Cal. 437, 46 P. 284 (Sup. Ct. 1896). Other state cases which have been located reach the identical conclusion for substantially the same reasons. *See State v. Clark,* 60 Ohio App. 367, 21 N.E. 484 (1938); *Manning v. State,* 175 Ga. 875, 166 S.E. 658 (Sup. Ct. 1932); *State v. Eno,* 109 N.W. 119 (Sup. Ct. Iowa, 1906). This Court has thoroughly reviewed federal criminal statutes, and annotations relating thereto, similar in nature to embezzlement, theft and larceny[2] and has been unable to find any legislative indication that Congress has sought to modify the traditional definition

2. 18 U.S.C. §§ 641-60.

and limitations of larcenous-like offenses. The logic of *People v. Cummings,* as applied in a federal context, appears to be as valid now as it was in 1896. It was instructive to this Court to note that the California legislature subsequently amended the California statute at issue in *Cummings.* The California Supreme Court thereafter held that it was proper for the legislature to depart from the common law by specifically including real property within the statute. *People v. Rabe,* 202 Cal. 409, 416, 261 P. 303, 306 (Sup. Ct. 1927). Since then real property in California has been held to be properly the subject of embezzlement, *People v. Roland,* 134 Cal. App. 675, 26 P.2d 517 (1933), as well as larceny. *People v. Pugh,* 137 Cal. App. 2d 226, 289 P.2d 826 (1955), *app. denied,* 352 U.S. 885 (1956); *People v. Brunwin,* 2 Cal. App. 2d 287, 37 P.2d 1072 (1934).

This Court was aware of and concerned with the fine distinctions being made when the motion for judgment of acquittal was urged by defendants at the close of the Government's case. Had the evidence shown that the property was sold by and for the benefit of Surety Savings with the defendants in their fiduciary capacities diverting the consideration of such sale

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for their own benefit, an indictment alleging embezzlement might have been proper. However, the circumstances of this case, accepted as true for purposes of this motion, showed that the alleged consideration never was intended to flow to Surety but only to the defendants. Although the defendants ostensibly deprived Surety Savings of real estate holdings, no funds, credits or securities belonging to Surety were taken. While this distinction is

a fine one, it is one that is critical to the offense of "embezzlement".

Criminal statutes are to be construed strictly with an eye to precedent, legislative history and common sense. *See United States v. Standard Oil Co.*, 384 U.S. 224, 255, 16 L.Ed.2d 492, 494, 86 S.Ct. 1427 (1966). This Court has made every effort to do so and has found no legislative indication that the traditional personal property limitation of embezzlement has been abrogated by Congress. For this Court to hold that real estate may be the subject of embezzlement under this federal statute as presently framed would not involve court interpretation, but would constitute judicial legislation.

The restricted usage of the term embezzlement necessitated the application of the doctrine of ejusdem generis to the phrase "other things of value" contained in Title 18, United States Code, Section 657. Properly interpreted, it may include only items of personal property. For the foregoing reasons, this Court granted defendants' motion for judgment of acquittal on the grounds that the indictment failed to state an offense against the United States of America.

DONE at Houston, Texas, this 8th day of November, 1973.

CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1974

NO. 74-2353

D. C. Docket No. CR-73-H-413

UNITED STATES OF AMERICA, Plaintiff-Appellant,

versus

CORNELIUS J. KEHOE and RAY K. BULLOCK
Defendants-Appellees.

Appeal From The United States District Court
For The Southern District of Texas

Before BELL, THORNBERRY and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

July 16, 1975

BELL, Circuit Judge, dissenting.

Issued as Mandate:

APPENDIX E

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk

October 1, 1975

TO ALL COUNSEL OF RECORD

No. 74-2353 - U.S.A. vs. Cornelius J. Kehoe
and Ray K. Bullock

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by (s) Clare F. Sacks
Deputy Clerk

cc: Mr. James R. Gough
Mr. Robert A. Hall
Messrs. Randy Schaffer
Richard Haynes

P.S. Judge Bell would grant the petition for rehearing before the panel for the reasons stated in his dissent to the majority opinion of the panel.

see

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